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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 40

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

THE OHIO LEATHER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 5, 1942
CERTIORARI GRANTED APRIL 6, 1942

SUPREME COURT OF THE UNITED STATES

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1 Before United States Board of Tax Appeals

Docket No. 96420

THE OHIO LEATHER COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

APPEARANCES

For Petitioner: Donald J. Lynn, Esq., H. A. Mihills, Esq.
For Respondent: T. H. Callahan, Esq.

Docket entries

1938

Dec. 12—Petition received and filed. Taxpayer notified. (Fee Paid.)
Dec. 13—Copy of petition served on General Counsel.
Dec. 12—Request for Circuit hearing in Cleveland, Ohio, filed by taxpayer. 12/13/38 copy served.

1939

Jan. 13—Praecipe for appearance of Donald J. Lynn as counsel for petitioner, filed.
Feb. 1—Answer filed by General Counsel.
Feb. 4—Copy of answer served on taxpayer. Cleveland, Ohio, calendar.
Aug. 31—Hearing set Oct. 23, 1939, in Cleveland, Ohio.
Oct. 23—Hearing had before Mr. Opper, Division 14, on the merits. Submitted. Stipulation of facts filed. Briefs due Dec. 7, 1939—replies due 12/22/39.
2 Nov. 2—Transcript of hearing 10/23/39 filed.
Dec. 7—Motion for extension of 20 days to file brief filed by taxpayer. 12/7/39 granted.
Dec. 7—Brief filed by General Counsel.
Dec. 29—Motion for extension to Jan. 17, 1940, to file brief filed by taxpayer. 1/2/40 granted.

1940

Jan. 17—Brief filed by taxpayer. 1/17/40 copy served.
Feb. 15—Motion for leave to file reply brief filed by taxpayer—reply brief lodged. 2/19/40 granted.
June 13—Memorandum opinion rendered—Mr. Opper, Division 14. Decision will be entered under Rule 50.
July 1—Agreed computation of deficiency filed.
July 3—Decision entered—Clarence V. Opper, Division 14.

1940
Sept. 21—Petition for review by U. S. Circuit Court of Appeals, Sixth Circuit, with assignments of error filed by General Counsel.
Sept. 26—Proof of service filed (counsel).
Sept. 27—Proof of service filed by General Counsel (taxpayer).
Oct. 14—Motion for extension to 12/20/40 to complete and transmit record filed by General Counsel.
Oct. 14—Order enlarging time to Dec. 20, 1940, to prepare and deliver record entered.
Nov. 20—Statement of points filed by General Counsel—proof of service thereon.
Nov. 20—Designation of portions of record filed by General Counsel with proof of service thereon.

3 Before United States Board of Tax Appeals

Petition

Filed December 12, 1938

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated September 12, 1938 and as a basis of its proceedings alleges as follows:

1. The petitioner is a corporation organized under the laws of the State of Ohio and having its principal office at 1052 North State Street, Girard, Ohio. The return for the period here involved was filed with the Collector for the eighteenth district of Ohio.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on September 12, 1938.

3. The amount of alleged deficiency covering income and undistributed profits tax for the calendar year 1936 is $3,858.92 and the amount of tax in controversy is $3,680.31.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

(a) In computing the surtax on undistributed profits, respondent has failed to allow as a credit against adjusted net income, the amount of $20,949.36, representing an amount equal to ten percent of the earnings and profits of the petitioner for the taxable year which the petitioner paid during the taxable year and which was required (by a provision of a written contract executed by petitioner prior to May 1, 1936, which provision ex-

pressly deals with the disposition of earnings and profits of the taxable year) to be irrevocably set aside and paid for the discharge of a debt.

5. The facts upon which petitioner relies as a basis for its appeal are as follows:

(a) The petitioner is a corporation organized under the laws of the State of Ohio and filed its income tax return for the calendar year 1936 with the Collector for the eighteenth district of Ohio.

4 (b) Under the provisions of a Trust Indenture executed by the petitioner prior to May 1, 1936, ten percent of the net earnings of the petitioner (as defined by said Trust Indenture) for the calendar year 1936 were required to be paid by the petitioner for the discharge of a debt.

(c) On December 16, 1936 and in compliance with the provisions of the Trust Indenture above referred to, petitioner paid $22,000.00 in discharge of a debt, which represented the amount petitioner had computed as an amount equal to ten percent of net earnings for the calendar year 1936 (as defined by the aforementioned Trust Indenture).

(d) Subsequent to December 16, 1936 petitioner determined that its net earnings for the calendar year 1936 (as defined by the aforementioned Trust Indenture) were $209,493.62 and that ten percent thereof was $20,949.36.

Wherefore, the petitioner prays that this Board may hear the proceedings and find that:

1. A credit in the amount of $20,949.36, representing an amount equal to the portion of the earnings for the calendar year 1936 required to be paid or irrevocably set aside from the petitioner's net earnings for such taxable year for the discharge of a debt, should be allowed against adjusted net income in the computation of the tax on the undistributed adjusted net income of the petitioner.

(Signed) DONALD J. LYNN,
Counsel for Petitioner,
1100 Mahoning National Bank Building, Youngstown, Ohio.
(Signed) H. A. MIHILLS,
Associate Counsel for Petitioner,
917 Munsey Building, Washington, D. C.

5 *Duly sworn to by V. G. Lumbard; jurat omitted in printing.*

Exhibit A to petition

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Cleveland, Ohio, September 12, 1938.

Office of Commissioner of Internal Revenue, Internal Revenue Agent in Charge, 415 Hanna Building.

Cleveland.
IRA: 90D.

THE OHIO LEATHER COMPANY,
1052 North State Street, Girard Ohio.

GENTLEMEN: You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1936 discloses a deficiency of $3,858.92, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

6 Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, 415 Hanna Building, Cleveland, Ohio. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,

By (Signed) R. C. CAKE,
Internal Revenue Agent in Charge.

Enclosures:
Statement.
Form of waiver.
VOD: tm.

STATEMENT

Cleveland.
IRA:90D.

In re: The Ohio Leather Company, 1052 North State Street, Girard, Ohio

TAX LIABILITY FOR THE TAXABLE YEAR ENDED DECEMBER 31, 1936

INCOME TAX

Liability, 1936, $45,683.08; assessed $41,824.16; deficiency $3,858.92.

7 In making this determination of your income tax liability, careful consideration has been given to the report of examination dated April 6, 1938; and to your protest dated June 23, 1938.

In your letter of protest dated June 23, 1938, you stated that a conference was not desired, therefore the statutory notice of deficiency is being issued at this time.

In filing your return for 1936 a credit of $22,000.00 was claimed in determining undistributed net income in the computation of surtax on undistributed profits. The credit was claimed under section 26(c)2 of the Revenue Act of 1936, and was based on a contract dated January 1, 1936.

It appears that under the terms of a bond indenture dated January 1, 1936, you are required to create a sinking fund and deposit therein annually on or before January 1st the sum of $25,000.00, and in addition thereto on or before the next succeeding first day of April an amount equal to 10% of the net earnings of your company for the prior year ended December 31st.

On December 16, 1936, you deposited with the Trustee, The Union National Bank of Youngstown, Ohio, $25,000.00 to cover the sinking fund requirement, and in addition thereto $22,000.00 estimated to represented 10% of your net earnings for the year ended December 31, 1936. The latter amount was claimed as a credit.

Since the payments under the provisions of the bond indenture are not required to be made out of the earnings and profits of the taxable year, it is held that the provisions of the contract in this connection do not satisfy the conditions prescribed in section 26(c)2 of the Revenue Act of 1936. The credit of $22,000.00 as claimed has therefore been disallowed.

TAXABLE YEAR ENDED DECEMBER 31, 1936

Net income as disclosed by return, $248,395.41.

8 COMPUTATION OF TAX

Taxable Year Ended December 31, 1936

INCOME TAX

Normal tax: Taxable net income		$248,395.41
Less:		
Interest on U. S. obligations	$595.84	
Dividends received credit	14,897.25	15,493.09
Net income for normal tax computation		$233,192.32
8% of $2,000.00		$160.00
11% of $13,000.00		1,430.00
13% of $25,000.00		3,250.00
15% of $193,192.32		28,978.85
Total normal tax		$33,818.85

Before United States Board of Tax Appeals

Answer

Filed February 1, 1939

COMES Now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and in answer to the petition in the above-entitled proceeding, admits and denies as follows:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4 (a). Denies that the Commissioner erred as alleged in subparagraph (a) of paragraph 4 of the petition.

5 (a). Admits the allegation of fact contained in subparagraph (a) of paragraph 5 of the petition.

5 (b) and (c). Denies the allegations of fact contained in subparagraphs (b) and (c) of paragraph 5 of the petition.

9 5 (d). Admits the allegation of fact contained in subparagraph (d) of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the appeal be denied.

Signed) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
DEWITT M. EVANS,
Division Counsel.
THOS. F. CALLAHAN,
Special Attorney, Bureau of Internal Revenue.

Before United States Board of Tax Appeals

THE OHIO LEATHER COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 96420

D. J. Lynn, Esq., and H. A. Mihills, C. P. A., for the petitioner.
DeWitt M. Evans, Esq., and Thomas F. Callahan, Esq., for the respondent.

Memorandum opinion

Entered June 13, 1940

OPPER: This proceeding was brought for a redetermination of a deficiency in petitioner's income tax in the sum of $3,858.92 for the year 1936.

10 The sole issue involved is whether petitioner is entitled to a credit under section 26 (c) (2) of the Revenue Act of 1936.

Substantially all of the facts are stipulated and are hereby found accordingly. Facts appearing in the summary below which are not part of the stipulation are otherwise found from the record.

Petitioner is an Ohio corporation with its principal office and place of business in Girard, Ohio. On or about April 17, 1936, petitioner entered into a trust indenture bearing date of January 1, 1936, and under which the Union National Bank of Youngstown was trustee.

For the purpose of borrowing money, petitioner directed the issue of its debentures in the aggregate principal amount of $900,000, designated as Ten Year 5% Convertible Sinking Fund Debentures.

The sinking fund provision in the indenture appears in Article Two thereof and in part is as follows:

"SECTION 1. The Company covenants that, to create a Sinking Fund for the further security of the Debentures issued hereunder, it will pay to the Trustee in coin or currency which at the time of payment is legal tender in the United States of America for the payment of private debts, annually on or before January 1, 1937 and each January 1 thereafter to and incuding January 1, 1945, the sum of Twenty-five Thousand Dollars ($25,000), and, in addition, shall, on or before the next succeeding first day of April, pay an amount equal to ten per cent (10%) of the net earnings earned by the Company during the fiscal year end-

ing on the thirty-first day of the next preceding December, as such net earnings are defined hereinafter in this Article, which sums and amounts shall be held by the Trustee for the security of all outstanding Debentures until paid out as hereinafter provided. * * *

"SECTION 2. On or before April 1, 1937, and thereafter annually on or before April 1st in each year to and including
11 April 1, 1945, the Company will cause Ernst & Ernst of Cleveland, Ohio, or such other certified public accountant or accountants as may be approved by the Trustee hereunder, to determine the amount, if any, of the net earnings of the Company for the fiscal year ended the last preceding December 31st.

* * * * *

"SECTION 5. * * *

"In lieu of payment of cash into the Sinking Fund as above provided in Section 1 of this Article, the Company may deliver to the Trustee, to apply upon such payments, Debentures issued hereunder with all unmatured coupons attached thereto, which have previously thereto been issued, sold and repurchased by the Company or otherwise acquired by the Company, and in each such event shall have credit therefor to the extent of the principal amount of such Debentures (but without accrued interest or premium thereupon) so delivered to the Trustee. The fact of re-purchase or re-acquisition by the Company shall be disclosed to the Trustee by a certificate with respect thereto delivered by the Company to the Trustee at the time of the delivery of said Debentures. The Company may, but need not, anticipate payments to the Sinking Fund either in cash or in Debentures and have credit therefor on its thereafter accruing obligation or obligations to pay moneys or deposit Debentures for the Sinking Fund."

* * * * *

As of January 1, 1936, petitioner issued the $900,000 principal amount of 5 per cent Convertible Sinking Fund Debentures which would mature on January 1, 1946. During the year 1936 $81,000 of these bonds were purchased by petitioner at a cost of not less than the principal amount thereof, and on December 16, 1936, bonds with a face value of $47,000 were deposited with the sinking fund trustee, $25,000 of which were required under the bond indenture to be paid on or before January 1, 1937, and
the balance of $22,000, represented approximately 10 per
12 cent of the net earnings of petitioner for the calendar year 1936, which 10 per cent was due and payable "* * * on or before the next succeeding first day of April * * *."

An extract from the minutes of the meeting of petitioner's board of Directors held December 14, 1936, is as follows:

"On motion made by MR. BOOTH, seconded by MR. GAYTON, and unanimously carried, the foregoing resolutions were adopted.

"Whereas, the Indenture covering the Company's issue of Nine Hundred Thousand Dollars ($900,000) Ten Year 5% Convertible Sinking Fund Debentures, due January 1, 1946, dated January 1, 1936, makes mandatory the disposition of net earnings; and

"Whereas, Section 26 (c) 2 of the Revenue Act of 1936 (defining credits permitted in connection with contracts restricting payments of dividends) required the payment or irrevocable setting aside within the taxable year, of the specified portion of the earnings or profits of the taxable year for the discharge of a debt incurred on or before April 30, 1936; and

"Whereas, information has been furnished to this Board of Directors that the ten per cent (10%) of the net earnings for the calendar year 1936 is Twenty-Two Thousand Dollars ($22,000).

"Now, therefore, be it resolved, that the officers of this Company be and are hereby authorized and instructed to specifically meet the requirements of said Indenture and Section 26 (c) 2 of the Revenue Act of 1936, and to irrevocably surrender to the Trustee, Debentures covered by said Indenture, with all unmatured coupons attached hereto, together with a certificate signed by the President or the Vice President, or the Treasurer of the Company, as to the price which the Company paid for such Debentures, and that such amount of Debentures to be irrevocably surrendered before December 31, 1936 shall have cost the Company not less than Twenty-Two Thousand Dollars ($22,000)."

13 The $47,000 principal amount of bonds deposited with the trustee on December 16, 1936 were cancelled and cremated.

Subsequent to December 16, 1936, petitioner determined that its net earnings, as defined by the trust indenture for the calendar year ending December 31, 1936, were $209,493.62.

Petitioner filed its income tax return on an accrual basis.

The question presented is identical with that considered in Strong Manufacturing Co., 41 B. T. A. — (May 29, 1940). Respondent's determination disallowing the claimed credit must accordingly be overruled. However, the amount of credit to which petitioner is apparently entitled is $20,949.36 as opposed to the $22,000 originally claimed. This was conceded by petitioner at the hearing by the statement of its counsel that "the

only credit which the company is now claiming is a credit of $20,949.86 instead of the 22 which was actually paid in on December 16". For this reason,

Decision will be entered under Rule 50.

Before United States Board of Tax Appeals

Decision

Entered July 3, 1940

Pursuant to Memorandum Opinion of the Board entered June 13, 1940, the respondent herein on July 1, 1940 having filed a recomputation of tax to which petitioner acquiesces, now, therefore, it is

ORDERED and DECIDED: That there is a deficiency in this petitioner's income tax for the year 1936 in the amount of $178.61.

[SEAL] (S) CLARENCE V. OPPER, *Member.*

14 In United States Circuit Court of Appeals

Petition for review and assignment of error

Filed September 21, 1940

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

Now comes the Comissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and John M. Morawski, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

JURISDICTION

The petitioner on review is the duly appointed, qualified and acting Commissioner of Internal Revenue, hereinafter referred to as the Commissioner, holding his office by virtue of the laws of the United States.

The respondent on review, The Ohio Leather Company (hereinafter referred to as the taxpayer), is a corporation organized and existing under the laws of the State of Ohio, with its principal office and place of business located at 1052 North State Street, Girard, Ohio. The Ohio Leather Company filed its income and excess-profits tax return for the calendar year 1936 with the Collector of Internal Revenue for the 18th District of Ohio,

at Cleveland, Ohio, and within the judicial circuit of the United States Circuit Court of Appeals for the Sixth Circuit.

The petitioner files this petition pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

II

Prior Proceedings

On September 12, 1938, the Commissioner determined a deficiency in income tax for the calendar year 1936 in the amount of $3,858.92, and sent to the taxpayer by registered mail a notice of said deficiency in accordance with the provisions of existing internal revenue laws. Thereafter, and on December 12, 1938, the taxpayer filed a petition for a redetermination of said deficiency by the United States Board of Tax Appeals.

The case was tried before the Board of Tax Appeals on October 23, 1939, at Cleveland, Ohio.

On June 13, 1940, the Board entered its memorandum opinion, and on July 3, 1940, entered its decision that there is a deficiency in income tax for the year 1936 in the amount of $178.61.

III

Nature of Controversy

The issue decided against the Commissioner relates to the credit claimed by the taxpayer, under section 26 (c) (2) of the Revenue Act of 1936, in computing its liability for surtax on undistributed profits.

As of January 1, 1936, taxpayer issued $900,000.00 principal amount of 5 percent Convertible Sinking Fund Debentures which would mature on January 1, 1946. During the year 1936, $81,000.00 of these bonds were purchased by taxpayer at a cost of not less than the principal amount thereof, and on December 16, 1936, bonds with a face value of $47,000.00 were deposited with the sinking fund trustee, $25,000.00 of which were required under the bond indenture to be paid on or before January 1, 1937, and the balance of $22,000.00 represented approximately 10 percent of the net earnings of the taxpayer for the calendar year 1936, which 10 percent was due and payable "* * * on or before the next succeeding first day of April * * *." Subsequent to December 16, 1936, the taxpayer determined that its net earnings, as defined by the trust indenture, for the calendar year 1936 were $209,493.62, 10 percent of which is $20,949.36. The trust indenture was executed prior to May 1, 1936.

The Commissioner, in his notice of deficiency, refused to allow any credit claimed for contracts restricting dividend payments. The taxpayer claims a credit of $20,949.36. The Board sustained the taxpayer, and stated that the question presented is
16 identical with that considered in Strong Manufacturing Company, (1940) 41 B. T. A.—No. 174 (now pending on Commissioner's petition for review in the Circuit Court of Appeals for the Sixth Circuit).

IV

Assignments of Error

The Commissioner avers that in the record and proceedings before the United States Board of Tax Appeals and in the opinion and final decision rendered and entered by the United States Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in said record, proceedings, opinion and final decision so rendered and entered by the United States Board of Tax Appeals:

1. In holding and deciding that there is a deficiency in income tax for the year 1936 in the amount of only $178.61.

2. In failing to sustain the deficiency in income tax determined by the Commissioner for the year 1936 in the amount of $3,858.92.

3. In holding and deciding that taxpayer is entitled to the claimed credit of $20,949.36, under section 26 (c) (2) of the Revenue Act of 1936, in computing its liability for surtax on undistributed profits.

4. In holding and deciding that the question is controlled by Strong Manufacturing Company, 41 B. T. A. — No. 174.

5. In failing to hold that no part of the earnings of the taxpayer for the taxable year was required by any provision of the contract to be paid or irrevocably set aside within the taxable year, and hence taxpayer is not entitled to any credit under section 26 (c) (2).

6. In that its opinion and decision are not supported by the evidence and are contrary to law.

Wherefore, the Commissioner petitions that the decision
17 of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Sixth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of

said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed by said Court.

(Sgd.) SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
(Sgd.) J. P. WENCHEL,
C. A. R.
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
JOHN M. MORAWSKI,
Special Attorney, Bureau of Internal Revenue.
Duly sworn to by John M. Morawski; jurat omitted in printing.

18 In United States Circuit Court of Appeals

Notice of filing petition for review

Filed Sept. 26, 1940

To: DONALD J. LYNN, Esq.,
1100 Mahoning National Bank Bldg.,
Youngstown, Ohio.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of September 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Sixth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 21st day of September 1940.

(Signed) B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25th day of September 1940.

(Signed) DONALD J. LYNN,
Counsel for Respondent on Review.

19 In United States Circuit Court of Appeals

Notice of filing petition for review

Filed September 27, 1940

To: THE OHIO LEATHER COMPANY,
1052 North State Street, Girard, Ohio.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of September, 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Sixth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 21st day of September 1940.

(Signed) J. P. WENCHEL,
C. A. R.
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 24th day of September 1940.

(Signed) THE OHIO LEATHER COMPANY,
Respondent on Review.
(Signed) V. G. LUMBARD, *President.*

20 In United States Circuit Court of Appeals

Statement of points

Filed November 20, 1940

Comes now the petitioner on review herein and makes this concise Statement of Points on which he intends to rely on the review herein, to wit:

The United States Board of Tax Appeals erred:

1. In holding and deciding that there is a deficiency in income tax for the year 1936 in the amount of only $178.61.

2. In failing to sustain the deficiency in income tax determined by the Commissioner for the year 1936 in the amount of $3,858.92.

3. In holding and deciding that taxpayer is entitled to the claimed credit of $20,949.36, under section 26(c) (2) of the Revenue Act of 1936, in computing its liability for surtax on undistributed profits.

4. In holding and deciding that the question is controlled by Strong Manufacturing Company, 41 B. T. A. — No. 174.

5. In failing to hold that no part of the earnings of the taxpayer for the taxable year was required by any provision of the contract to be paid or irrevocably set aside within the taxable year, and hence taxpayer is not entitled to any credit under section 26(c)(2).

6. In that its opinion and decision are not supported by its findings of fact and are contrary to law.

(Signed) J. P. WENCHEL,
R. L. W.
Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the above statement of points is hereby acknowledged this 14th day of November 1940.

(Signed) H. A. MIHILLS,
Counsel for Respondent on Review.

21 Before United States Board of Tax Appeals

Designation of portions of record, proceedings, and evidence to be contained in record on review

Filed November 20, 1940

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in connection with the petition for review by the said Circuit Court of Appeals for the Sixth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries.
2. Pleadings:
   (a) Petition,
   (b) Answer to Petition.
3. Board's memorandum opinion and decision.
4. Petition for review.
5. Notices of filing.

6. Statement of points.
7. This designation.

(Signed) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the within designation of portions of record, proceedings, and evidence to be contained in record on review is hereby admitted this 19th day of November 1940.

(Signed) H. A. MIHILLS,
Counsel for Respondent on Review.

22 In United States Circuit Court of Appeals For the Sixth Circuit

No. 8842

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

v.

THE OHIO LEATHER COMPANY, RESPONDENT ON REVIEW

Order permitting enlargement of the record on review

Filed January 10, 1941

On motion of counsel for the Respondent on Review it is Ordered: That an enlargement of the Record on Review herein be permitted by Respondent on Review in order that the same shall receive and include the following additional evidence: Stipulation of facts entered into and agreed upon between the parties herein that the trial of this cause before the United States Board of Tax Appeals, and the Clerk of the United States Board of Tax Appeals is ordered to prepare, transmit and deliver to the Clerk of this Court copies thereof duly certified as correct.

CHARLES C. SIMONS,
Judge of the United States Circuit Court of Appeals.

23 Before United States Board of Tax Appeals

Stipulation of facts

Filed January 18, 1941

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall

be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true:

(1) Petitioner, The Ohio Leather Company, is a Corporation organized and existing under the laws of the State of Ohio with its principal office and place of business located at 1052 North State Street, Girard, Ohio. A Corporation Income and Excess-Profits Tax Return for the calendar year 1936 was filed with the Collector of Internal Revenue for the 18th District of Ohio on or before May 15, 1937.

(2) The amount of alleged deficiency covering income and undistributed profits tax for the calendar year 1936 is $3,858.92.

(3) Prior to May 1, 1936, to-wit, on or about the 17th day of April, 1936, petitioner entered into a Trust Indenture with The Union National Bank of Youngstown, as Trustee, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof.

(4) As of January 1, 1936, the petitioner corporation issued $900,000.00 principal amount of 5% convertible sinking fund debentures which would mature on January 1, 1946. These bonds were sold at a discount to net the issuing corporation $873,000.00. During the year 1936 $81,000.00 of these bonds were purchased by the petitioner at a cost of not less than the principal amount thereof and on December 16, 1936, bonds with a face value of $47,000.00 were deposited with the sinking fund trustee, The Union National Bank of Youngstown, Ohio, $25,000.00 of which were required under the bond indenture to be paid on or before January 1, 1937, and the balance, $22,000.00, represented approximately 10% of the net earnings of the petitioner
24 corporation for the calendar year 1936, which 10% was due and payable, "* * * on or before the next succeeding first day of April * * *."

(5) An extract from the minutes of the meeting of the Board of Directors of the petitioner corporation held on December 14, 1936, is as follows:

"On motion made by Mr. Booth, seconded by Mr. Gayton, and unanimously carried, the foregoing resolutions were adopted.

"Whereas, the Indenture covering the Company's issue of Nine Hundred Thousand Dollars ($900,000) Ten Year 5% Convertible Sinking Fund Debentures, due January 1, 1946, dated January 1, 1936, makes mandatory the disposition of net earnings; and

"Whereas, Section 26 (c) 2 of the Revenue Act of 1936 (defining credits permitted in connection with contracts restricting payments of dividends) required the payment or irrevocable setting

aside within the taxable year, of the specified portion of the earnings or profits of the taxable year for the discharge of a debt incurred on or before April 30, 1936; and

"Whereas, information has been furnished to this Board of Directors that the ten per cent (10%) of the net earnings for the calendar year 1936 is Twenty-two Thousand Dollars ($22,000),

"Now, therefore, be it resolved, that the officers of this Company be and are hereby authorized and instructed to specifically meet the requirements of said Indenture and Section 26 (c) 2 of the Revenue Act of 1936, and to irrevocably surrender to the Trustees, Debentures covered by said Indenture, with all unmatured coupons attached hereto, together with a certificate signed by the President or the Vice President, or the Treasurer of the Company, as to the price which the Company paid for such Debentures, and that such amount of Debentures to be irrevocably surrendered before December 31, 1936, shall have cost the Company not less than Twenty-two Thousand Dollars ($22,000)."

25 (6) Subsequent to December 16, 1936, petitioner determined that its net earnings, as defined by the aforesaid Trust Indenture, for the calendar year ending December 31, 1936, were $209,493.62.

(7) That the sole issue in controversy in this proceeding is that of a credit under Section 26 (c) 2 of the Revenue Act of 1936, and, if the Board shall find—

(a) That such credit is not allowable to petitioner then it shall find a deficiency against petitioner in the amount of $3,858.92, but,

(b) If such credit is allowable to petitioner, then it shall find a deficiency against petitioner in the amount of $178.61.

(Signed) H. A. Mihills,
(Signed) Donald J. Lynn,
Counsel for Petitioner,
(Signed) J. P. Wenchel,
D. M. C.
Counsel for Respondent.

Now, January 15, 1941, the foregoing is certified from the record, exclusive of Ex. "A," as a true copy.

[SEAL] (Signed) B. D. Gamble,
Clerk, U. S. Board of Tax Appeals.

26 [Clerk's certificate to foregoing transcript omitted in printing.]

Before United States Board of Tax Appeals

Order enlarging time

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Sixth Circuit, be and it is hereby extended to December 20, 1940.

[SEAL] (Signed) C. R. ARUNDELL, *Member.*

Dated, Washington, D. C., October 14, 1940.

Now, December 9, 1940, the foregoing is certified from the record as a true copy.

(Signed) B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

27 In United States Circuit Court of Appeals for the Sixth Circuit

Cause argued and submitted

November 11, 1941

Before HAMILTON, MARTIN, and MCALLISTER, JJ.

This cause is argued by Bernard Chertcoff for Petitioner and by Donald J. Lynn for Respondent and is submitted to the court.

In United States Circuit Court of Appeals

Decree

Entered December 9, 1941

This cause was heard upon the transcript of the record, briefs and arguments of counsel, and on consideration whereof,

It is ordered, adjudged, and decreed that the order of the Board of Tax Appeals be and the same is affirmed in accordance with our opinion in Commissioner of Internal Revenue vs. Strong Manufacturing Company, — Fed. (2d) —, this day decided.

28 [Clerk's certificate to foregoing transcript omitted in printing].

29 Supreme Court of the United States

Order allowing certiorari

Filed April 6, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 46344. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 40. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner vs. The Ohio Leather Company. Petition for a writ of certiorari and exhibit thereto. Filed March 5, 1942. Term No. 40 O. T. 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942